IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 119 of 2007
With
Criminal Appeal No. 46 of 2007
With
Criminal Appeal No. 47 of 2007
With
Criminal Appeal No. 48 of 2007
With
Criminal Appeal No. 121 of 2007

Date of decision : 13th July, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 13.07.2007 Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 119 of 2007

Rakesh @ Dhola
S/o Sauraj R/o Jhabreda
P.S. Jhabreda
District Haridwar ..Appellant

Versus

State of Uttarakhand ... Respondent

With

Criminal Appeal No. 46 of 2007

Rakesh @ Dhola
S/o Sauraj R/o Jhabreda
P.S. Jhabreda
District Haridwar ...Appellant

Versus

State of Uttarakhand ... Respondent

With

Criminal Appeal No. 47 of 2007

Yogesh @ Marshall
S/o Sauraj
R/o Jhabreda
P.S. Jhabreda
District Haridwar ...Appellant

Versus

State of Uttarakhand ... Respondent

With

Criminal Appeal No. 48 of 2007

Ravi Vas
S/o Shri Atar Singh
R/o Village Sunehati
P.S. Jhabreda
District Haridwar ...Appellant

Versus

State of Uttarakhand ... Respondent

With

Criminal Appeal No. 121 of 2007

Ravi Vas
S/o Shri Atar Singh
R/o Village Sunehati
P.S. Jhabreda
District Haridwar ...Appellant

Versus

State of Uttarakhand ... Respondent

Mr. Arvind Vashisth, Advocate for the appellant Ravi Vas.
Mr. K.S. Verma, Advocate with Mr. R.K.S. Verma, Advocate for Rakesh @ Dhola and Yogesh @ marshall.
Mr. G.S. Sandhu, learned Government Advocate with Mr. Amit Bhatt, learned A.G.A. for the respondent/State.

Coram: Hon'ble Rajeev Gupta, C.J
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. Since all criminal appeals have arisen out of the common impugned judgment and order dated 05.02.2007 passed by Addl. District Judge, Roorkee in S.T. Nos. 296 of 2002, 297 of 2002, 252 of 2003 and 367 of 2005, hence all these appeals have been heard together and are being disposed of by this common judgment. By the impugned judgment and order, the appellants-Ravi Vas, Rakesh @ Dhola and Yogesh @ Marshall were convicted under sections 364 IPC, 302/34 IPC & 201 IPC and each of them were sentenced to undergo 7 years R.I., imprisonment for life and 5 years respectively. Each of the appellants were further directed to pay fine of Rs. 500/-, Rs. 2000/- and Rs.500/- on each counts respectively and in default of payment of fine the appellants were to undergo for further six months R.I., 1 year R.I. and 6 months R.I. Respectively. The appellant Ravi Vas was also convicted and sentenced to undergo for one year R.I. and a fine of Rs.500/- under section 25 of Arms Act. In default of payment of fine of Rs.500/-, the appellant Ravi Vas was to undergo for further 15 days R.I. The appellant Rakesh @ Dhola was also convicted and sentenced to undergo for one year R.I. and a fine of Rs. 100/- under section 25/4 Arms Act. In default of payment of fine of Rs. 100/-, the appellant-Rakesh @ Dhola was to undergo for further 15 days R.I. However, the appellants Ravi Vas, Rakesh @ Dhola and Yogesh @ Marshal were acquitted from the charges under

sections 147 & 148 IPC. Co-accused Shivram was acquitted of the charges leveled against him.

2. Brief facts of the case are that complainant Krishna Chandra Garg PW1 lodged a gumsudgi report Ex.Ka.2 of his son Yogesh Kumar on 27.10.2001 alleging therein that his son Yogesh Kumar, L.I.C. agent, has left for Roorkee on 25.10.2001 at about 9.00 am, but he did not return from there. It was learnt that on 25.10.2001 at 6:30 p.m., he took bicycle of one Ram Singh from Iqbal Pur Sugar Mill Colony and left for Jhabreda. Thereafter, a thorough search was made. When he was not found, Krishna Chandra Garg lodged an F.I.R. Ex.Ka.1 at P.S. Jhabreda on 08.01.2002 alleging therein that he lodged a gumsudgi report of his son on 27.10.2001. On 07.01.2002 he went to village Delana where he was informed by one Aman Singh PW2 that after 2-3 days of *Dussehra* he saw Yogesh Kumar going towards 'Sunheti' Jungle in the company of Rakesh @ Dhola, Yogesh @ Marshal, Shivram, Mursleen and Ravi Vas. Aman Singh PW2 also told the complainant that he did not disclose this fact to anyone due to fear. Aman Singh PW2 further told him that he knew the aforesaid persons and advised him to make search of his son. On the basis of the F.I.R., a chick report was prepared and necessary entry was made in the General Diary vide Ex.Ka.9. The investigation of the case was entrusted to S.I. Suraj Bhan PW8. The then S.O. Jhabreda Vimal Chandra PE9 arrested the accused Ravi Vas and Rakesh @ Dhola on 08.01.2002 and a country made pistol and a cartridge were recovered from the personal search of accused Ravi Vas whereas from the personal search of Rakesh @ Dhola, a knife of prohibited size was recovered. Thereafter, both the accused/appellants were interrogated by

the police. The dead body (human skeleton) was recovered from the sugarcane field of one Babu Ram at Sunheti at the pointing out by the accused/appellants Ravi Vas and Rakesh @ Dhola. The said human skeleton (dead body) was identified by the informant Krishna Chandra PW1 as Yogesh Kumar. Thereafter, the investigation was transferred from S.I. Suraj Bhanu PW8 to the then S.O. Vimal Chandra PW9 in the month of February, 2002 and he started the investigation of the case after the perusal of the case diary and he recorded the statement of the witnesses. The Investigating Officer after completing the necessary formalities of the investigation submitted the chargesheet before the court. He submitted the chargesheet against Ravi Vas, Rakesh @ Dhola and Yogesh @ Marshall u/s 147, 148, 149, 364, 302 & 201 I.P.C. He further indicated in the chargesheet that the accused Shiv Ram and Mursleen are not traceable, as such, proceedings u/s 82 and 83 Cr.P.C. is going on against them. No chargesheet was submitted against the accused Shiv Ram and Mursleen. It is also revealed from the record that later on a separate chargesheet was filed against accused Shiv Ram.

3. After submission of chargesheet the accused/appellants were committed to the court of Sessions for trial and the trail court framed charges against the accused persons. They denied the charges levelled against them and claimed their trail.

4. The prosecution in support of its case examined eleven witnesses. Krishna Chandra Garg PW1 is father of deceased Yogesh Kumar. He lodged gumsudgi report and F.I.R. (Ex.Ka.2 and Ex.Ka.1 respectively). Aman Singh PW2 is the

witness who saw the accused persons taking the deceased towards the field of sugarcane. This witness has disclosed this fact to the father of the deceased Krishna Chandra Garg PW1. Bhram Pal Singh PW3 and Shyam Lal PW5 have proved the factum of recovery of the dead body of deceased from the sugarcane field of Babu Ram at the pointing out of accused/appellants Rakesh @ Dhola and Ravi Vas. Praveen Kumar PW4 is the scribe of the reports Ex.Ka.1 and Ex.Ka.2. He scribed the report on the dictation of Krishna Chandra Garg PW1. Surendra Kumar PW6 & also Bhram Pal Singh PW3 have proved the factum of discovery of spade and chain from the field of Baburam at the pointing out of Yogesh @ Marshall. Dr. Suresh Kumar Chauhan PW7 is the medical officer who conducted the postmortem of the deceased. Suraj Bhanu PW8 is the Sub Inspector who investigated the case in part. Vimal Chandra PW9, Station Officer is also the Investigating Officer of this case and he completed the rest of the investigation and submitted the chargesheet. Constable Hitler Singh PW10 is a formal witness of police. S.I. Govind Singh Manola PW11 has investigated the case against the accused-appellants Ravi Vas and Rakesh @ Dhola under Arms Act and submitted the chargesheets Ex.Ka.24 and Ex.Ka.25 against the accused/appellants Ravivas and Rakesh @ Dhola.

5. The accused/appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated tat they have been falsely implicated due to enmity.

6. The learned trial court on appreciation of the evidence convicted the accused/appellants and sentenced them as mentioned above. Co-accused Shivram was not found guilty

of the offence charged against him in S.T. No. 252 of 2003 and he was accordingly acquitted.

7. We have heard learned counsel for the parties and perused the record.

8. At the outset, it needs to be mentioned here that the prosecution has adduced the evidence of Dr. Suresh Kumar Chauhan PW7, who received the dead body of Yogesh Kumar in sealed condition and conducted the postmortem on 09.01.2002. After examination of the dead body, Dr. Suresh Kumar PW7 has written the following remarks on the postmortem report:-

> *"Body skeleton except left leg and foot belonging to human being. No soft tissue except few part buttock and right lower limb. Soil presents all over the body. No maggot present. Nails are missing. Skull bones are separated to each other. But belongs to human and one person. No cut mark on bines of skulls."*

Dr. Suresh Kumar Chauhan PW7, Medical officer has opined that the deceased was about 35 years old. After conducting the postmortem of the dead body, the medical officer has handed over mandible and upper jaw, left clavicle, left humerus, left pelvis and left femur to the constable in sealed condition. In addition to this, the medical officer has also handed over torn white black lined shirt, torn trousers and paint drenched with black soil to the constable. It was also stated by the medical officer that there were 9 teeth in upper jaw and 11 or 4 in the lower jaw. In the opinion of Medical Officer, the cause of the death of the deceased could not be

ascertained hence bones were preserved. It was further opined that the duration of death was about 2 months before.

9. The prosecution has led the evidence that skeleton was identified by the father of the deceased Krishna Chandra PW1 by the apparels which the deceased was wearing at the time of leaving his house. The same apparels were recovered from the skeleton at the time of the recovery. It was pointed out that the father of the deceased also identified his son by one missing tooth and the said description has not been indicated in the F.I.R. When the missing report was lodged, only the apparels and outwardly description have been mentioned in the missing report. While submitting the missing report at the police station, the father of the deceased was not aware that his son had been murdered. As such, he has given the outwardly description of the apparels of his son by which any person could identify who saw him at the outset. The apparels which the deceased was wearing at the time of leaving his house was recovered from the skeleton, as such, the dead body was identified by the father of the deceased. Therefore, it is established that the death of Yogesh Kumar S/o Krishna Chandra PW1 has occurred.

10. Now, we have to consider whether the accused-appellants were responsible for committing the murder of the deceased- Yogesh Kumar. There was no eyewitness of the occurrence. It needs to be mentioned here that the prosecution case rests upon the circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it would be such as to point out only to the guilt of the accused and the evidence should exclude all other hypothesis except the guilt of the accused. It is often said that though

witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge such a chain wherefrom no inference other than the guilt can be drawn.

11. Learned counsel for the appellants contended that the evidence of the prosecution was not of such character which could inspire confidence and to indicate the chain of circumstances which lead to the only conclusion that none else except the appellants had committed the crime. Learned G.A. refuted the contention. Learned counsels for the parties have taken us though the evidence of the prosecution.

12. The first circumstance projected by the prosecution against the accused-appellants is that the deceased Yogesh Kumar was seen in the company of the accused after 2-3 days of the *Dussehra* in the year 2001 by Aman Singh PW2. The prosecution has adduced the evidence of Aman Singh PW2 who has seen the accused-appellants Ravi Vas, Yogesh @ Marshall, Rakesh @ Dhola, Sriram and Mursleen dragging the deceased Yogesh Kumar at Sunheti jungle when he was coming to his village from Sunheti on his motorcycle. Aman Singh PW2 has further stated in his evidence that he went to village Sunheti in his motorcycle to see and purchase buffalo. He has deposed that the wearing apparels of the deceased were soaked with mud. He has further deposed that he knew

the accused persons but he has not disclosed this fact to anyone due to fear. This witness has further stated that when he has seen Krishna Chandra Garg PW1 in a very perturbed condition is connection with his missing son sitting at the shop of Sitaram after 2-1/2 months after the incident, he disclosed to him that he had seen the appellants dragging the deceased Yogesh Kumar at Sunheti jungle after 2-3 days of *Dussehra.* He has narrated the entire story to him.

13. The trial court has dis-believed the evidence of Aman Singh PW. The trial court has held that Aman Singh PW2 went to village Sunheti to purchase buffalo but he did not remember the name of the persons where he has seen the buffalo for purchase. The trial court has further disbelieved the evidence of Aman Singh PW2 on the ground that he could not state in his cross examination as to how long he knows Krishna Chandra PW1, father of the deceased Yogesh Kumar. The trial court has further held that Aman Singh PW2 has stated in his evidence while coming from village Sunheti, he saw the accused persons dragging the deceased Yogesh Kumar from a distance of about ½ furlong. He has further stated that he has seen the accused/appellants & co-accused from the back side. The time of the occurrence has been alleged to be 6:00 or 6:30 p.m. in the evening. The trail court has further held that Aman Singh PW2 could not have recognized the accused and the victim from the back side at a distance of ½ furlong at about 6:00 or 6:30 pm. particularly in the month of October & November. The trial court has further disbelieved the testimony of Aman Singh PW2 on the ground that he did not disclose this fact to anyone either in the village or his family members. It is in the evidence that he made the disclosure of the above fact for the first time

after 2-1/2 months to the father of the deceased Yogesh Kumar. The learned trial court has discarded the evidence of Aman Singh PW2 on the above broad features. The reasons given by the trial court are cogent and go a long way in creating doubt about the evidence of Aman Singh PW2. The trial court has given cogent reason as stated above and we are completely in agreement with the findings recorded by the learned trail court discarding the evidence of Aman Singh PW2. We do not find any fault in the approach of the trial court while discarding the evidence of Aman Singh PW2. In view of the above, the first circumstance projected against the accused/appellants is not proved beyond reasonable doubt.

14. Whereas the motive of the commission of the offence is concerned, the learned counsel for the accused/appellants contended that the prosecution has not adduced any evidence with regard to the motive of the incident. Learned G.A. refuted the contention. The learned trial court has held that there was a motive to commit the offence. The learned trial court has relied upon a G.D. entry in which it has been recorded by the police officer that the accused were hopeful that they would get 4-5 lacs in the abduction of the deceased Yogesh Kumar as ransom because he was a Life Insurance Agent. It was further held by the learned trial court that the deceased Yogesh Kumar was kept 10-1 days in custody and the accused tried to contact to get the ransom from his family members but they could not get contact with them. Meanwhile, the deceased fell ill so the accused/appellants killed him. The learned trail court fell in error wile relying upon the G.D. entry recorded by the police officer on the statement of the accused. We have gone through the entire

evidence on record and found that there is not even an iota of evidence about demand of ransom from family members of the deceased Yogesh Kumar. The learned trial court has relied upon the G.D. entry which could not be taken into account. The learned trial court fell in error in holding that there was motive to commit the offence in absence of any admissible evidence on record. This case rests on the circumstantial evidence. It is settled position of law that if the prosecution has failed to establish the motive when the ocular testimony of eyewitnesses is so strong, credible and cogent, the motive become inconsequential. This case does not rest on the direct evidence of the eyewitnesses. It rests on the circumstantial evidence. Motive by itself is not sufficient to prove the guilt of accused but at the same time in the case of the circumstantial evidence if the prosecution proves by cogent evidence that there was a motive to commit the offence, it adds a link to the circumstances projected against the accused. In this case, there is no motive. The absence of motive also leads to take an inference as to why the accused would cause the death of the deceased Yogesh Kumar.

15. The next circumstance projected by the prosecution is that the dead body was recovered at the pointing out of the accused Ravi Vas and Rakesh @ Dhola. The prosecution has led the evidence of S.I. Suraj Bhanu PW8 who has stated in his evidence that the S.O. Concerned of the police station arrested the accused Ravi Vas and Rakesh @ Dhola and he made the interrogation of the accused/appellants. Thereafter, the accused/appellants Ravi Vas and Rakesh @ Dhola confessed their guilt. G.D. No. 17 was recorded by the S.O. Perusal of the G.D. No. 17 reveals that

accuses/appellants Ravi Vas and Rakesh @ Dhola disclosed the fact that they can discover the skeleton from the place where it has been kept. The said fat was confirmed by the accused/appellants Ravi Vas and Rakesh @ Dhola. The prosecution also produced the evidence of Bhram Pal Singh PW3 who has stated in his evidence that the deceased Yogesh Kumar s/o Krishna Chandra PW1 had been working as Insurance Agent. He has further stated in his evidence that the dead body was recovered from the sugarcane field of Babu Ram on 08.01.2002 at about 2:30 or 2:45 p.m. when it was dug out by the accused/appellants at the pointing out of accused/appellants Ravi Vas and Rakesh @ Dhola. He has further stated that Krishna Chandra PW1, father of the deceased and he had identified the dead body of the deceased by missing tooth of upper jaw and by the apparels which the deceased was wearing. He is also the witness of the recovery of dead body and signed the recovery memo of the dead body Ex.Ka.4. Thereafter the police took the dead body in its custody and prepared the panchayatnama. He has further stated that he has signed on panchayatnama. Shyam Lal PW5 has also corroborated the evidence of Bhram Pal Singh PW3 and he is also the witness of the recovery of the dead body and he signed the recovery memo Ex.Ka.4. He is also the witness of panchayatnama. Both the witnesses have stated that the father of the deceased was also present at the time of the recovery. The body was identified by the father of the deceased at the spot.

16. Now it has to be seen whether the evidence of the recovery of skeleton is reliable or not. The learned trial court has believed the evidence of the prosecution of recovery of the dead body at the instance of accused/appellants Ravi Vas

and Rakesh @ Dhola. Section 27 of the Indian Evidence Act lifts the ban against the admissibility of the confessional /statement made to the police to a limited extent by allowing proof of information of a specified nature furnished by the accused in police custody. Section 27 of Indian Evidence Act is an exception to the rules embodied in Section 25 and 26. The prosecution has to prove for taking the benefit of Section 27, the police officer should depose before the court that he discovered the fact in consequence of the information received from accused persons in police custody. This fact must be disclosed by the accused at the first time to the police officer. It this fact was within the knowledge of the police officer prior to the discovery statement, the prosecution cannot take the benefit of the said statement for getting the recovery by the accused on the basis of said statement given to the police. It is only so much relates to the distinctly to the fact thereby discovered that can be proved and nothing more. The court while appreciating the evidence would exclude the rest of the information given by the accused to the police officer except information as relates distinctly to the fact thereby discovered. The Apex Court in **Anter Singh Vs. State of Rajasthan 2005 SCC (Cri) 597** has held as under :-

> *"15. At one time it was held that the expression "fact discovered" in the section is restricted to a physical or material fact which can be perceived by the senses, and that it does not include a mental fact, now it is fairly settled that the expression "fact discovered" includes not only the physical object produced, but also the place from which it is produced and the knowledge of the accused as to this, as noted in Pulukuri Kottaya V. Emperor, AIR 1947, PW67and in Udai Bhan v. State of U.P. AIR, 1962 SC 116.*

16. The various requirements of the section can be summed up as follows:

(1) the fact of which evidence is sought to be given must be relevant to the issue. It must be borne in mind that the provision has nothing to do with the question of relevancey. The relevancy of the fact discovered must be established according to the prescriptions relating to relevancey of other evidence connecting it with the crime in order to make the fact discovered admissible.

(2) The fact must have been discovered.

(3) The discovery must have been in consequence of some information received from the accused ad not by the accused' own act.

(4) The person giving the information must be accused of any offence.

(5) He must be in the custody of a police officer.

(6) The discovery of a fact in consequence of information received from an accused in custody must be deposed to.

(7) Thereupon only that portion of the information which relates distinctly or strictly to the fact discovered can be proved. The rest is inadmissible."

17. Now we will examine the evidence of the prosecution in view of the above. Suraj Bhan PW8 has stated in his examination is chief as under :-

"---- तथा रो0 आम में र0 न0 16 समय 13:15 पर अभि0 गण की गिरफतारी का तस्करा अंकित कराया था समय 13:25 बजे र0न0 17 पर एस ओ साहब ने अभि0 गण रविवास व राकेश से पूछताछ की थी जिसमें अभि0 गण ने योगिश कुमार लाला का अपहरण करके मार देने तथा लाल योगेश लाला चलकर बरामद कराना बताया था।**"**

It is further revealed from G.D. 16 that S.O. Vimal Chandra PW9 alongwith S.I. Suraj Bhan PW8 other police raiding party arrested the accused on 08.01.2002. According to S.I. Suraj Bhanu PW8, the interrogation of the accused/appellants Ravi Vas and Rakesh @ Dhola was made by the S.O. Vimal Chandra PW9 and not by Suraj Bhan PW8, the then Investigating Officer. S.O. Vimal Chandra PW9 has stated that he tool over the investigation after 2nd February, 2002. He has stated in his cross examination as follows :-

> **"**अभियुक्त राकेश व रविवास के अलग अलग बयान लिये गये थे। दोनो बयान पूर्व के विवेचन द्वारा लिये गये थे। रविवास के बयान में केवल यह बात है कि उसने अभियुक्त राकेश की बयान की ताहीद की है। यह बात अंकित नही है कि अभियुक्त घटना से सम्बन्धित वस्तुओं को या कंकाल को बरामद करा सकता है।**"**

Thus, these statements are clearly inconsistent with each other. It is not established by cogent evidence as to whom the disclosure statement was given by the aforesaid accused/appellants. Apart from this, we may briefly refer to the legal position as regards joint disclosures. This point assumes relevance in the context of such disclosures made by the accused/appellants Ravi Vas and Rakesh @ Dhola. The admissibility of information said to have been furnished by both of them leading to the discovery of the dead body of the deceased Yogesh Kumar. Joint disclosures, to be more accurate, simultaneous disclosures, per se, are not inadmissible under Section 27. It seems to us that the real reason for not acting upon the joint disclosures by taking resort to Section 27 is the inherent difficulty in placing reliance on such information supposed to have emerged from the mouths of two or more accused at a time. In fact, joint or simultaneous disclosure is a myth, because two or more

accused persons would not have uttered informatory words in a chorus. At best, one person would have made the statement orally and the other person would have stated so substantially in similar terms a few seconds or minutes later, or the second person would have given unequivocal nod to what has been said by the first person. Or, two persons in custody may be interrogated separately and simultaneously and both of them may furnish similar information leading to the discovery of fact. We do not think that such disclosures by two or more persons in police custody go out of the purview of section 27 altogether. If information is given one after the other without any break, almost simultaneously, and if such information is followed up by pointing out the material thing by both of them, we find no good reason to eschew such evidence from the regime of Section 27. However, there may be practical difficulties in placing reliance on such evidence. In other words, the deposition in regard to the information given by the two accused may be exposed to criticism from the standpoint of credibility and its nexus with discovery. Whether and to what extent such a simultaneous disclosure could be relied upon by the Court is really a matter of evaluation of evidence. In the case in hand the prosecution evidence reveals that S.I. Suraj Bhanu PW8 has stated that interrogation was made by S.O. Vimal Chandra PW9. Whereas S.O. Vimal Chandra PW9 has stated that the statement of the accused/appellants Rakesh @ Dhola and Ravi Vas was taken separately by S.I. Suraj Bhanu PW8. There is no clear evidence of S.I. Suraj Bhanu PW8 and S.O. Vimal Chandra PW9 (both the investigating officers) who recorded the disclosure statement of the accused/appellants. When the Investigating officer was dealing wit more than one accused, it was obligatory on his part to state in the

evidence t what words in which manner were uttered by them so that a recovery to the information received may be connected to the persons giving the information so as to provide incriminating evidence against them. The Hon'ble Apex Court in the case **Mohd. Abdul Hafeez Vs. State of A.P. (1983) I SCC 143** has held at para 5 as under:-

> *"5.The next piece of evidence against the appellant is that he along with Accused 2 and 3 gave information to the Investigating Officer that the ring MO1 was sold to jeweler PW 3 Pandurangam Kondiah. Now, who gave this information leading to the recovery of this ring MO 1 left us guessing. In examination-in-chief PW 3 Pandurangam Kondiah stated that his jewellary shop is near Gulzar House, that in the course of his business he buys and sells ornaments and jewels. He deposed that on December 27, 1978, Accused 1 to 4 whom he identified in the Court, came to his shop and sold ring MO 1 to him for Rs 325. He further stated that on December 27, 1978, a Sub-Inspector of Police and some constables accompanied by Accused 1 to 3 came to his shop and Accused 1 to 3 asked him to produce MO 1 ring which they had sold to him. He stated tat he took out MO 1 ring from the show-case and placed it on the box and the same was attached by the Sub-Inspector of Police under Ex. P-2. Does this evidence make any sense? He says that Accused 1 to 4 sold him the ring. He does not say who had the ring and to whom he paid the money. Similarly, he stated that Accused 1 to 3 asked him to produce the ring. It is impossible to believe that all spoke simultaneously. This way of recording evidence is most unsatisfactory and we record out disapproval of the same. If evidence otherwise confessional in character is admissible under Section 27 of the Indian Evidence Act, it is obligatory upon the Investigating Officer to state and record who gave the information; when he is dealing with more than one accused, what words were used by him so that a recovery pursuant to the information received may be connected to the person giving the information so as to provide incriminating evidence against that person. The evidence of Pandurangam, therefore, hardly provides any incriminating evidence against the present appellant. And this jeweler does not enquire how four persons*

unconnected with each other came together to sell one ring and that did not arouse any suspicion in him. The jeweler is undoubtedly a purchaser of stolen property. His evidence itself would require some corroboration (sic in) the circumstances of this case and none is forthcoming."

There is nothing in the evidence which suggests that who disclosed the information first and in whose disclosure statement the discovery u/s 27 was made by the accused/appellants. As such, the evidence of prosecution becomes doubtful.

18. Apart from this, the F.I.R. was lodged by Krishna Chandra PW1 on the basis of the statement given by Aman Singh PW2 that he has seen his son Yogesh Kumar being dragged by the accused after 2-3 days of *Dussehra* in the forest of Sunheti. The informant Krishna Chandra PW1 has reported on 08.01.2002 at about 6:30 a.m. that his son has been abducted by the accused/appellants. The prosecution has led the evidence that the distance between the place of occurrence and Jhabreda where the police station situated or the father of the deceased resided is about 13-14 kms. The accused/appellants Rakesh @ Dhola and Ravi Vas were arrested at 11:45 a.m. on 0801.2002. Thereafter, the accused/appellants Rakesh @ Dhola and Ravi Vas were lodged in the police station at about 13:15 hrs. The interrogation was made by the police to the accused Rakesh @ Dhola and Ravi Vas on 13:25 hrs. and the dead body was recovered at the instance of both the aforesaid accused at about 2:50 p.m. from the place of occurrence. The inquest report was started to be prepared at about 4:15 p.m. and it was completed at 16:00 hrs. It is also pertinent to mention here that the G.Ds. were recorded & the F.I.R. u/s 25 Arms

Act was recorded at the police station and the police covered a distance of 13-14 kms. with a quick succession to recover the dead body of the deceased. The dead body of the deceased Yogesh Kumar was also recovered at the instance of the aforesaid accused/appellants from Sunheti jungle.

Bhram Pal Singh PW3 has stated in his deposition as follows:-

> "मैं इन्टर पास हूॅ। मैं खेती करता हूॅ। इस मामले में पहली बार 8 जनवरी को थाने गया था। मुझे योगेश के अपहरण का एक महीने से पता था। हमें पहली बार योगेश की हत्या का 8 तारीख जनवरी को पता चला था। पूरे कस्बे में चर्चा थी कि योगेश की हत्या हो चुकी है। हम चर्चा सुनकर उसके लाला कृण्ण चन्द गर्ग के घर गये वहॉ रोना पीटना हो रहा था। हम 12–1 बजे कृण्ण चन्द के मकान में पहुचे थे। रोहा पीटी जब हो रही थी तब तक लाश बरामद नही हुयी थी। मेरा घर कृण्ण चन्द के घर से 400 मीटर दूर है। घटना स्थल पर हम खुद गये थे, कोई बुलाकर नही ले गया था। सबसे पहले हम कृण्ण चन्द के घर गये, उसके घर पर पुलिस आयी थी।"

It is apparent from the above sequence of the events as stated above that the accused/appellants disclosed the fact that they murdered the deceased after 13:15 hrs. Shyam Lal PW5 has deposed in his cross examination as follows:-

> "दिनांक 08–01–02 को पूरे कस्बे मे चर्चा हो गयी थी कि अपहत योगेश की लाश मिल गयी है। पूरा कस्बा सुनहरी गांव का था। जब बरामदगी स्थल पर गये थे, पुलिस थी, गांव के काफी लोग थे और मुलजिम भी थे।

From the above quoted evidence it is revealed that prior to the discovery of dead body, the people of the town had knowledge that the deceased has been murdered. As such, the discovery as projected by the prosecution is doubtful.

19. Apart from this Bhram Pal Singh PW3 has stated in his cross examination as follows:-

"घटना स्थल पर हम खुद गये थे, कोई बुलाकर नही ले गया था। सबसे पहले हम कृण्ण चन्द के घर गये, उसके घर पर पुलिस आयी थी।

धटना स्थल पर मैं 1, 1–1/2 बजे पहुॅच गया था। उस वक्त मौके पर 150–200 आदमी मौजूद था। मुझे पता नही की वहॉ सुनहरी का ग्राम प्रधान था या नही, क्योकि मै उसे जानता नहीं हूॅ। सुनहरी गांव का बाबूराम जिसका खेत था, वही मौजूद था, बाकी लोगों के नाम याद नही हैं। मेरे अलावा सुनहरी गांव के अन्य लोगो के भी हस्ताक्षर कराये थें। मेरे ध्यान नही हस्ताक्षर कितने कागजो पर कराये। जो मिट्टी व कपडे सील किये गये थे। उन पर भी मेरे हस्ताक्षर हुये थे।"

Shyam Lal PW4 has stated in his deposition as under:-

"हम झवरेडा से दोपहर एक बजे के करीब सब निकले थे। टे^{a}क्टर ट^{a}ाली के द्वारा मौके पर पहुचे थे। ब्रहमपाल, नरेश, दीपक व संजीव हमारे साथ थे। कृण्ण चन्द गर्ग मेरे साथ नही गये थे, अपने आप मौके पर पहुॅच गये थे। पुलिस अपने वाहन के द्वारा आगे–2 थी और हम ट^{a}क्टर ट^{a}ाली में पीछे–2 आये थे। बरामदगी का स्थान कस्बा झबरेडा से 13.14 किमी0 दूर है।"

He is further stated as under :-

"बरामदगी स्थल पर जाने के लिए कितने राह उपलब्ध थे, मुझे नही मालूम, हम तो पूलिस की गाडी के पीछे–2 पहुच गये थे। आस पास लोग खेतो मे काम कर रहे थे। जब हम मौके पर पहुचे तो खेतों पर काम करने वाल लोग भी वहॉ आ गये थे। बाबूराम जिसका खेत था वह मौके पर नही था।"

Vimal Chandra PW9 has stated in his cross examination as under:-

"खेत मालिक बाबूराम को मैने नही बुलाया था। ग्राम प्रधान सुनहरी को भी मैने नही बुलाया था। गॉब सुनहरी से कितने लोग आये थे गिनती नही बता सकता वैसे काफी लोग आये थे । मैंने किसी का नाम मालूम नही किया ना ही किसी को गवाह बनाया। पूर्व विवेचन द्वारा कस्बा झबरेडा के श्यामलाल, ब्रहमपाल, व वादी मुकदमा व पुलिस कर्मचारी गण को गवाह बनाया था। खेत जिसमें कंकाल मिला उसका ईख कितना बडा था मैने नापा नही था। यह कहना गलत है मैनें मन गढंत तरीके से गलत आरोप पत्र प्रषित किया हो।"

It is apparent from the above quoted evidence that the persons of the vicinity were available at the spot. Suraj Bhan PW8 has given a different version in the following words:

"कंकाल बरामदगी के समय मैने ग्राम सुनेहरी के लोंगो को बुलाया था तथा झबरेडा के हमारे साथ थे। सुनेहरी से लोंगो को बुलाने वाली बात सी डी में अंकित नहीं है। यह कहना गलत है कि यह इन्द्राज इसलिये ना हो कि ऐसे कोई घटना स्थल ही ना हो। झबरेडा थाने पर मैं करीब पोने दो साल रहा हूॅ। कस्बा झबरेडा से सुनेहरी जाने के लिए इकबालपुर के रास्ते से करीब 3–4 गॉव पडते है।"

In view of the above, the learned counsel appearing for the appellants very seriously contended that the evidence led by the prosecution with regard to the recovery of dead body is unnatural and the same cannot be accepted by any reasonable person. Having perused the evidence of Bhram Pal Singh PW3 and Shyam Lal PW5, who were the witnesses of the recovery of dead body, belong to Jhabreda town. Bhram Pal Singh PW3 is a close neighbour of the deceased Yogesh Kumar. He resides about 400 meters away from the house of Krishna Chandra PW1. The other witness also belongs to Jhabreda and he is employee in a gas agency in the same town. The distance between Jhabreda and the place of occurrence (village Sunheti) is about 13-14 kms. The manner in which the alleged recovery was made also

creates a serious doubt in our mind. It is seen from the evidence led by the prosecution that the *panch* witnesses of the recovery memo belong to Jhabreda. According to the prosecution witnesses themselves as quoted above there were number of persons present witnessing the recovery. Bhram Pal Singh PW3 had also admitted in his cross examination that the Investigating Officer also obtained the signature of some of the persons present at the spot on the recovery memo. Perusal of the recovery memo reveals that there were no witnesses of village Sunheti except Praveen Kumar PW4 and Shyam Lal PW5 belonging to Jhabreda. Both Investigating Officers S.I. Suraj Bhanu PW8 and S.O. Vimal Chandra PW9 had not recorded in the recovery memo that they had tried to take the independent witnesses present at the spot belonging to village Sunheti and the person present at the spot were not willing to become the witnesses of the recovery of the dead body. In absence of such evidence, the court cannot draw an inference that the witnesses present at the spot were not willing to be the witness of recovery of dead body. This serious error in the background of the facts and circumstances of this case that even though many independent witnesses were available as witnesses for the recovery, the prosecution acted on using an admittedly the witnesses known to the prosecution. Considering the totality of cumulative facts and circumstances of this case, the manner throws a great suspicion on the alleged recovery which is the foundation of the prosecution case against the accused/appellants. Therefore, the recovery of the dead body at the instance of the accused-appellants becomes doubtful. The learned trial court has erred in believing the evidence of recovery of dead body.

20. The prosecution has further projected next circumstance that spade, chain and lock were recovered at the instance of Yogesh @ Marshall. The prosecution has led the evidence of S.I. Suraj Bhan PW8 who has stated in his evidence that on 11.01.2002 the accused/appellant Yogesh @ Marshall was arrested at about 11:00 a.m. and he was interrogated by the police and he has stated that he could recover the spade by which the dead body of the deceased Yogesh Kumar was buried in sugarcane field. He further deposed that he could also get recovered chain and lock by which the deceased Yogesh Kumar was tied after the abduction till his death. Bhram Pal Singh PW3 has stated in his evidence that on 11.01.2002, accused Yogesh Kumar was arrested by the police. Thereafter, recovery of spade, chain and lock was made from the sugarcane field of Babu Ram on the pointing out of the accused Yogesh Kumar. Thereafter, S.I. prepared the fard Ex.Ka.6 and he has signed it. Surendra Kumar PW6 in his evidence has corroborated the evidence of Bhram Pal Singh PW3. The said articles said to have been discovered are not connected with commission of the crime. These articles are not the weapons by which the offence was committed. The evidence of the prosecution or so-called disclosure statement did not indicate that the spade, chain and lock to which the reference was allegedly made were the weapons of the assault. It cannot be held that recovery of spade, chain and lock is in any way an incriminating circumstance against the accused/appellant Yogesh @ Marshall.

21. The prosecution has led the evidence that on 08.01.2002 the disclosure statement made by other co-accused/appellants consequently thereof the dead body of

the deceased Yogesh Kumar was recovered from the sugarcane field of Babu Ram. The recovery of the dead body (human skeleton) was made from the same field from where these spade, chain and lock were recovered by the police on 11.01.2002. The recovery of spade, chain and lock were made from the open space though there was sugarcane crop on the field. The distance between the place from where the dead body was recovered on 08.01.2002 and the place from where the spade, chain and lock were recovered on 11.01.2002 is said to have been at about 14 to 15 feet. Both the recoveries are said to have been made from same sugarcane field of Babu ram in village Sunheti. There is no evidence that these articles were hidden in such a way so as to make it difficult to be noticed. Thus, it was apparent that the Investigating Officer who visited the place of occurrence would definitely have visited the nearby place in the field and he could have noticed these articles at that time. The above discrepancies and shortcomings in the evidence considerably erode the prosecution version. The Hon'ble Apex Court in the case of **State of T.N. Vs. Sundar** reported in **2005 SCC (Cri) 844** has held at para 5 as under:-

> *".....That apart, we also notice some other materials in the prosecution case which compound our suspicion in regard to the prosecution case. It is the case of the prosecution that on 18-3-1984 after the arrest of the accused, he led them to a tree just behind the post officer building whereunder a bloodstained towel was recovered. The prosecution had earlier alleged that the body of the deceased was found in a septic tank behind the post officer on 17-3-1984. The tree under which the bloodstained towel was recovered is also behind the post officer, therefore, the septic tank and the tree must be close to each other. If that be so, how the investigating agency missed noticing the bloodstained towel under the tree on the day of inquest is not explained by the prosecution. From the evidence in this*

regard led by the prosecution, there is noting to show that this bloodstained towel was concealed in such a manner that the IO could not have noticed it on 17-3-1984 itself……..”

22. In view of the above, we are of the opinion that the prosecution could not establish the guilt beyond reasonable doubt against appellants Rakesh @ Dhola, Yogesh @ Marshall and Ravi Vas u/s 364, 302/34 and 201 I.P.C. Thus the conviction and sentences awarded by the trail court against appellants Rakesh @ Dhola, Yogesh @ Marshall and Ravi Vas u/s 364, 302/34 and 201 I.P.C. are liable to be set aside.

23. Now, we have to consider as to whether the prosecution has been able to prove the case against Ravi Vas and Rakesh @ Dhola u/s 25 and 25/4 Arms Act respectively. S.I. Vimal Chandra PW9, the then S.O. has categorically stated that on 08.01.2002 he was in search of the accused Ravi Vas and Rakesh @ Dhola in Case Crime No. 1 of 2002 u/s 147, 148, 149, 364, 302/34 & 201 I.P.C. He was informed by the informant that the accused Ravi Vas and Rakesh @ Dhola were repairing their motorcycle at Manakpur Tirah. The police party headed by S.I. Vimal Chandra PW9 proceeded to the place of occurrence and they stopped their jeep from where the accused Ravi Vas and Rakesh @ Dhola could be seen. The informant pointed out the accused Ravi Vas and Rakesh @ Dhola to the raiding party and thereafter he left from there. The police party immediately apprehended the accused Ravi Vas and Rakesh @ Dhola and their personal search were made. A country made pistol 315 bore and one cartridge of 315 bore was recovered from the personal search of accused Ravi Vas, whereas a knife was recovered from the

Personal search of accused Rakesh @ Dhola. The said articles were sealed at the spot and recovery memos were prepared at the spot. The country made pistol, cartridge and knife were identified by the then S.O. Vimal Chandra PW9 in the Court. The said witness was cross-examined at length but nothing could be elicited in his cross-examination to discredit his testimony. His testimony is natural and he cannot be disbelieved. We have gone through the entire evidence of S.O. Vimal Chandra PW9. It was contended that S.O. Vimal Chandra PW9 is the only recovery witness examined by the prosecution who is a police personnel and in absence of any public witness his testimony alone should not be held to be sufficient for sustaining the conviction of the accused Ravi Vas and Rakesh @ Dhola. In our opinion the contention raised by the learned counsel for the appellants is too broadly stated and cannot be accepted. The testimony of police personnel should be treated in the same manner as testimony of any other witnesses and there is no principle of law that without corroboration by independent witnesses their testimony cannot be relied upon. The presumption that a person acts honestly applies as much in favour of a police personnel as of other persons and it is not a proper judicial approach to distrust and suspect them without good grounds. It will all depend upon the facts and circumstances of each case and no principle of general application can be laid down. The arrest memo Ex.Ka.8 clearly indicates that S.O. Vimal Chandra PW9 tried to contact the independent witnesses but they showed their unwillingness. The ground realities cannot be lost sight of that even in normal circumstances members of the public are very reluctant to accompany a police party which is going to arrest a criminal or is embarking upon search of some premises. It is also noteworthy that during

the course for the cross examination of the witnesses, the defence did not even give any suggestion as to why they were falsely deposing. There is absolutely no material or evidence on record to show that the police had any reason to falsely implicate the appellants. Therefore, the contention raised by the learned counsel for the appellants regarding non examination of public witnesses, the testimony of the prosecution witness who is a police personnel should not be relied upon, has hardly any substance and cannot be accepted. Therefore, we are of the view that the prosecution has established the guilt beyond reasonable doubt against the accused-appellants Ravi Vas and Rakesh @ Dhola u/s 25 Arms Act. We find that the learned trial court has rightly convicted and sentenced the accused-appellants Ravi Vas and Rakesh @ Dhola u/s 25 Arms Act.

24. In view of the foregoing discussion, the conviction and sentence awarded by the trail court against the appellants Rakesh @ Dhola, Yogesh @ Marshall and Ravi Vas u/s 364, 302/34 and 201 I.P.C. are set aside. Therefore, the appellants Rakesh @ Dhola, Yogesh @ Marshall and Ravi Vas are acquitted of the charges levelled against them u/s 364, 302/34 and 201 I.P.C. However, the conviction and sentence awarded by the trial court against the accused-appellants Ravi Vas and Rakesh @ Dhola under section 25 and section 25/4 Arms Act respectively are hereby maintained. All the appeals stand disposed of accordingly.

25. Appellant Yogesh @ Mashall is in custody. He be set at liberty forthwith if not wanted in connection with any other case.

26. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months from the date of receipt of order.

(J.C.S.Rawat, J.) (Rajeev Gupta, C.J.)

Dated 13th July, 2007
Shiv